Supreme Court, U.S.
FILED
JUL 14 2004
OFFICE OF THE CLERK

No. 04 89

IN THE
SUPREME COURT OF THE UNITED STATES

GREGORY WITTMAN

-Petitioner

vs.

ROBERT WILSON; PETER ACCICA; CLAY HAWTHORNE; MICHAEL PASSERI; INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 32,

-Respondents

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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Gregory Wittman
Petitioner in Pro se
3423 Carpenter Road Lot. No82
Ypsilanti, Michigan 48197
Telephone No. (734) 973-8453

Questions Presented

This case started out as an improper discipline case under 29 U.S.C. § 411(a)(5). The District Court misconstrued and mishandled Petitioners case by changing it into a Freedom of Speech case under 29 U.S.C. § 411(a).

the Respondents conspired together to expel Petitioner from [his] Union shortly after [he] campaigned for office against Respondent Robert Wilson; the Respondents improperly tried [him] before an invalid Trial Board, and the Invalid trial Board expelled Petitioner from [his] Union.

Hon. Nancy G. Edmunds (District Court Judge assigned to the case) ignored the fact that the Respondents Trial Board was not officially confirmed by the Union members as required by the Union's Constitution and Bylaws. Judge Edmunds dismissed Petitioners 29 U.S.C. § 411(a)(5) case for failing to appear on time at the Union trial. Wherefore the questions presented are:

1. Whether or not a member of a labor organization waives his protected rights under 29 U.S.C. § 411(a)(5) if he fails to appear before an invalid, unofficial Trial board.

2. Whether the Sixth Circuit's decision to "AFFIRM" the District Court's judgment against the Petitioner so far departs from the accepted and usual course of judicial proceedings, or sanction such a departure by the District Court, as to call for an exercise of this Court's supervisory power.

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgments below.

OPINIONS BELOW

The Opinion of the Sixth Circuit United States Court of Appeals appears at Appendix A of the petition and is unpublished.

The Opinions of the United States District Court appear at Appendix B, C, and D of the petition and are unpublished.

The United States Court of Appeals denied a timely filed petition for rehearing en banc and a copy of that Order appears at Appendix E and is unpublished.

JURISDICTION

The unpublished Order of the Court of Appeals was entered on January 30, 2004. A timely petition for rehearing en banc was denied on April 19, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 1 Sec. 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) states in pertinent part as follows:

> "No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined....by any officer thereof unless such member has been (A)

served with written specific charges; (B) given a reasonable time to prepare his defense; and (C) afforded a full and fair hearing. (b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect."

Title 1 Sec. 609 of the LMRDA provides in pertinent part as follows:

> "It shall be unlawful for any labor organization,...or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right which he is entitled under the provisions of this act."

STATEMENT OF THE CASE

On December 6, 2000 Petitioner handed out campaign literature in [his] Union hall—campaigning for Union office against Respondent Robert Wilson. Wilson ordered Petitioner to stop handing out the Campaign literature and the Petitioner obeyed.[1]

On January 10, 2001, Respondents' Accica, Hawthorne, and Passeri (Union officers) conspired together (for Wilson) to expel Petitioner from the Union. On January 17, 2001 Wilson informed Petitioner that Accica, Hawthorne and Passeri filed charges.[2] A trial was scheduled for 5:30 P.M. on February 20, 2001.

On February 20, 2001 the Union hall was closed after regular business hours and the Respondents claim they left a back door (used for after hours Union meetings) unlocked for

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[1] August 26, 2002 Affidavit of Robert Wilson

[2] Exhibit No. 3 of Complaint

the Petitioner. Wilson claimed that they waited until approximately 5:50 P.M. at which time the trial proceeded without the Petitioner.[3] The Petitioner was found guilty of all charges, expelled from [his] Union, and fined an additional $25.00 for failing to appear at the trial.[4]

On July 10, 2001, the Petitioner filed a Complaint against the Respondents with the Federal District Court Eastern District of Michigan, alleging that the Respondents violated two laws; Title I Sec. 101(a)(5) and Sec. 609 If the LMRDA.[5]

On January 30, 2002, the Petitioner filed a motion for judgment and on February 25, 2002 (before the Petitioners motion for judgment hearing), Petitioner filed additional Union documents of which proved the Respondents Trial Board was not officially confirmed by a vote of the Union members as required by the Union Constitution and Bylaws.[6]

On March 11, 2002, at Petitioners motion for judgment hearing, Magistrate Wallace Capel Jr. asked Petitioner one question—if [he] attended the Respondents Union Trial. the Petitioner answered "no" stating that [he] arrived fifteen minutes late and nobody answered the door to let [him] in so he left thinking everyone else left.[7]

On August 20, 2002, Mag. Capel filed a Report and Recommendation acknowledging that the Respondents failed to serve Petitioner with specific charges as required by law[8] but ignored the fact that the Respondents Trial Board was invalid. Mag. Capel shockingly recommended that Petitioner's motion for judgment be denied stating,

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[3] August 26, 2002 Affidavit of Robert Wilson
[4] February 20, 2001 Rulings by the Trial Board
[5] July 10, 2001 Complaint
[6] Docket entry No. 47
[7] March 11, 2002 hearing Transcripts at 25
[8] Appendix D

> "It remains a question of material fact as to whether the union acted reasonably in adopting and enforcing the rule prohibiting union members from disseminating campaign literature within the union hall."[9]

The Petitioner objected—reminding the Court that [he] was expelled from his Union by the Respondents invalid Trial Board—and prayed for relief.[10]

On September 17, 2002, District Court Judge Honorable Nancy G. Edmunds filed an Order dismissing Petitioners case for failing to appear on time at the Respondents Union trial and would only allow Petitioner to pursue a Free Speech issue under 29 U.S.C § 411(a)[11]—an issue Petitioner did not allege in the Complaint nor was [he] prepared.

In January 2003, the Petitioner informed the District Court that [he] was reluctant to pursue a Free Speech issue under 29 U.S.C. § 411(a) because [he] did not exaust internal remedies on the issue.[12] On April 30, 2003, Magistrate Capel recommended that Petitioner be sanctioned $6,008.00 for refusing to be deposed by the Respondents on Free Speech issues.[13] On May 20, 2003, Hon. Nancy G. Edmunds adopted Magistrate Wallace Capel, Jr.'s recommendation and sanctioned Petitioner $6008.00 to compensate the Respondents.[14]

The Petitioner appealed [his] case to the Sixth Circuit U.S. Court of appeals and on July 8, 2003 the District Court shockingly seized Petitioners family car and work truck for

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[9] Appendix D
[10] Docket Entry No. 73
[11] Appendix C
[12] Docket entry No. 120
[13] Docket No. 135
[14] Appendix B

the Respondents.

On January 30, 2004, The Sixth Circuit Court of Appeals "affirmed" the District Courts judgment because the Petitioner failed to cooperate in discovery (of the "phantom" Free speech issue conjured by the District Court).[15]

Plaintiff timely filed a motion for rehearing en banc—reminding the Court that Free Speech is not at issue in this case. On April 19, 2004 The Court denied the motion.[16]

REASON FOR GRANTING THIS PETITION

The lower Courts' misconstrued and mishandled Petitioners case and caused further damage to the Petitioner. Review by this Court is Petitioners last hope for relief.

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Date: July 10, 2004

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[15] Appendix A
[16] Appendix E

APPENDIX A

No. 03-1719
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY WITTMAN,
Plaintiff-Appellant,

v

ROBERT WILSON; PETER ACCICA;
CLAY HAWTHORNE; MICHAEL PASSERI;
INTERNATIONAL UNION OF BRICKLAYERS AND
ALLIED CRAFTWORKERS LOCAL 32,
jointly and severely,
Defendants-Appellees.

ORDER

Before: MARTIN, RYAN, and MOORE, Circuit Judges
January 30, 2004

Gregory Wittman appeals a district court judgment that granted summary judgment for defendants in part and dismissed his complaint in part in this civil action filed under § 101(a) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a). This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P.34(a).

In 2000, Wittman filed his complaint pro se in the district court, alleging that he was wrongfully removed from his union after he exercised his right to freedom of speech during his campaign for a union office. On March 1, 2002,

defendants first moved the district court to compel Wittman to submit to a deposition. Wittman responded on opposition to the motion to compel, but agreed to submit to a deposition and was ordered to do so following a hearing before the magistrate judge. Nonetheless, Wittman filed a motion for a judgment on the pleadings, and the defendants responded in opposition and moved for summary judgment. The magistrate judge recommended that both parties' motions be denied, and both parties filed objections. The district court accepted the magistrate judges recommendation in part and rejected it in part, and granted summary judgment for defendants except with respect to Wittman's claim that defendants violated his free speech.

Ultimately, the magistrate judge recommended that Wittman's remaining claim be dismissed and that $6008.00 in sanctions be imposed against Wittman for failure to comply with discovery orders. Over Witman's objections, the district court adopted the magistrate judge's recommendation, dismissed the complaint, and imposed the recommended sanctions. Wittman filed a timely appeal.

On Appeal, Wittman contends that the district court improperly dismissed his complaint. Defendants respond that the district court properly granted them summary judgment in part, and properly dismissed plaintiff's complaint in part. In addition, Wittman has filed a motion to take superseding control over this case and order the return of property seized from him to satisfy the district court's award of sanctions against him. Defendants have responded in opposition to Wittman's motion, and Wittman has filed a reply.

Generally, this court reviews de novo a grant of summary judgment. Brooks v. Am. Broad. Cos., 932 F. 2d 495, 500 (6th Cir. 1991). The district court's judgment dismissing plaintiff's remaining claim under Fed. R. Civ. P. 37(b) for willful failure to cooperate in discovery is reviewed only for an abuse of discretion. Nat'l Hockey league v. Metro. Hockey Club, Inc., 427 U.S. 639, 642 (1976); Harmon v. CSX Transport, Inc., 110 F. 3d 364, 366-367 (6th

Cir. 1997). Upon consideration, we will affirm the district court's judgment for the reasons stated by the district court.

First, the district court properly granted summary judgment for defendants with respect to plaintiff's claim that defendants gave him inadequate notice of the disciplinary charges against him. Essentially, defendants asserted that plaintiff waived this claim because he did not appear at the scheduled union trial of which plaintiff was given notice. In response, the district court correctly noted that plaintiff made only belated and bald assertions that he arrived fifteen minutes late for the hearing and that no one was present. Under these circumstances, the district court properly granted summary judgment for defendants because plaintiff showed no more than a metaphysical doubt as to the existence of a genuine issue of material fact remaining for trial. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp. 574, 586 (1986). In any event, this claim would have been subject to dismissal as a sanction for plaintiff's willful failure to cooperate in discovery.

Rule 37(b)(2) authorizes a district court to enter a default judgment and dismiss a case where the sanctioned party failed to obey an order to provide or permit discovery. This court considers four factors in assessing the appropriateness of the district court's decision to dismiss a complaint: (1) whether the party's failure to cooperate in discovery is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's failure to cooperate in failure to cooperate in discovery; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal was ordered. Harmon, 110 F. 3d at 366-67. Pre-dismissal warning of the sanction is pivotal to the determination of willfulness. *See* Harris v. Callwood, 844 F. 2d 1254, 1256 (6th Cir. 1988). Dismissal with prejudice "should be imposed only if the court concludes that the party's failure to cooperate in discovery was willful, in bad faith, or due to its own fault." Beil v.

Lakewood Eng'g &Mfg. Co., 15 F. 3d 552 (6th Cir. 1994).

Here, the district court did not abuse its discretion in dismissing this action after considering the four factors cited above. The magistrate judge detailed Plaintiff's actions in this case, and those actions need not be detailed herein. However, there is no doubt that Wittman's efforts to thwart discovery were willful and in bad faith. Further, the existence of prejudice is clear because he undermined defendants' ability to defend this case. Also, the magistrate judge and district court repeatedly directed plaintiff to submit to a deposition and to otherwise provide discovery, and warned that sanctions including dismissal were possible. Finally, lesser sanctions imposed by the magistrate judge did not result in Wittman's cooperation in discovery. Accordingly, the district court did not abuse its discretion in dismissing Plaintiff's remaining claim.

For the forgoing reasons, the motion for superseding control is denied, and the district court's judgment is affirmed. *See* Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

s/

Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No.01-CV_72578 DT
Hon. Nancy G. Edmunds
Mag. Wallace Capel, Jr.

GREGORY WITTMAN,
Plaintiff,

v.

ROBERT WILSON, PETER ACCICIA, CLAY HAWTHORNE, MICHAEL PASSERI, of/and LOCAL 32, MICHIGAN
jointly and severely,
Defendants.

Hon. Nancy Edmunds May 20, 2004

JUDGMENT

This action came before the court, Honorable Nancy G. Edmunds, District Judge, presiding, and the issues having been reviewed and a decision having been duly rendered,

It is ORDERED AND ADJUDGED that Plaintiff's complaint be DISMISSED WITH PREJUDICE for failing to comply with the court's discovery orders under Fed.R.Civ.P, 37(b)(2)(C). Furthermore, the undersigned adopts the recommendation that Plaintiff be subjected to monetary sanctions under Fed.R.Civ.P. 37(b) in the amount of $6,008.00 to compensate Defendants for his refusal to pursue

this lawsuit in good faith.

It is further ORDERED that the Clerk serve a copy of this Judgment by United States mail on the Plaintiff and on the Plaintiff and on the counsel for the Defendants.

s/

Nancy G. Edmunds
United States District Judge

Dated at Detroit, Michigan on May 20, 2003

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No.01-CV_72578 DT
Hon. Nancy G. Edmunds
Mag. Judge Wallace Capel Jr.

GREGORY WITTMAN,
Plaintiff,

v.

ROBERT WILSON, ET.AL.,
Defendants,

Hon. Nancy G. Edmunds September 17, 2002

ORDER ACCEPTING IN PART AND REJECTING IN PART THE MAGISTRATE'S REPORT AND RECOMMENDATION DATED AUGUST 20, 2002

This matter comes before the Court on the Magistrate Judge's August 20, 2002 Report and Recommendation that Plaintiff's motion on the pleadings and Defendants' motion for summary judgment be denied. Being fully advised in the premises and having reviewed the record and the pleadings, including the parties' objections, the Court Accepts and Adopts the Magistrate Judge's conclusion that Plaintiff's motion for judgment on the pleadings be denied. This Court also Accepts in part and Rejects in part the Magistrate judge's conclusion that Defendants' motion for summary judgment be denied.

The Court accepts that portion of the Magistrate's Report and Recommendation addressing Plaintiff's free speech claim brought pursuant to 29 U.S.C. § 411(a)(2). Contrary to Defendants' arguments, Plaintiff's free speech claim cannot be construed solely as a challenge to election procedures or results. Rather, Plaintiff alleges that Defendants' conduct (forcing him to distribute his campaign literature outside the union hall) resulted in a violation of 29 U.S.C. § 411(a)(2) which provides union members with free speech rights, "subject to the organization's established and reasonable rules pertaining to the conduct of meetings." Defendants have not convinced the Court that they are entitled to judgment as a matter of law concerning the reasonableness of Local 32's rule regarding distributing of campaign literature.[1]

The Court rejects that portion of the Magistrate's Report and Recommendation addressing Defendants' waiver argument concerning Plaintiff's claims of inadequate notice of the discipline charges filed against him. Defendants argue that, even if notice to Plaintiff failed to adequately notify him of the charges against him, Plaintiff waived these claims because he failed to appear at the scheduled trial of those charges despite notice of the date and time. This Court agrees with Defendants and finds that Plaintiff has waived these claims. Plaintiff's belated and bald assertions at the motion hearing, i.e., that he arrived late for the scheduled trial, saw no cars in the parking lot, saw that the gate to the back parking lot was also locked, and left after no one answered his knock on the door, is not enough to create a genuine issue of material fact. Accordingly, this Court grants in part Defendants' motion for summary judgment and

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[1] The Court denies this portion of Defendants' motion for summary judgment without prejudice, thus allowing Defendants to raise the argument again after discovery is completed but before the cut-off date for dispositive motions.

dismisses Plaintiff's claims asserting a violation of 29 U.S.C. § 411(a)(5) in connection with his disciplinary action.

Plaintiff admits that he did not ask for a rehearing arguing that he had arrived late and could not gain entry to his scheduled disciplinary trial. *See* 3/11/02 hrg. Transcript at 25. Plaintiff also admits that, when he filed his appeal, he failed to provide the appeal board with any excuse for failing to attend his trial because he thought the issues he did raise were more important. *See id.* at 26-27. Despite Plaintiff's assertion, raised for the first time at the hearing, that he sent a letter informing Robert Wilson of the reasons he was late, Plaintiff has not produced or otherwise discussed any such letter in this litigation. This is true despite the fact that Defendants' motion relies heavily on the waiver issue and Defendants have submitted an affidavit refuting Plaintiff's bald assertions made at the motion hearing. *See id.* at 25. *See also* Robert Wilson 8/26/02 affidavit ¶ 2.

There is nothing in the record to support Plaintiff's bald assertions belatedly made at the motion hearing before the Magistrate Judge. There are no allegations about attempting but failing to gain entry at his scheduled theal in Plaintiff's complaint or in the briefs supporting his motion or opposing Defendants' motion despite the fact that Defendants motion relies heavily on Plaintiff's non-appearance in support of its waiver argument. The record also reflects that this Plaintiff is not meek about raising objections or arguments in support of his claims. His unsupported assertions here, however, are not enough to survive Defendants' waiver arguments. ***See*** Daniels v. Nat'l Alliance of Postal and Federal Employees, No. 83-1444, 1985 WL 6408 (D.D.C. Oct. 4, 1985) (quoting Ritz v. O'Donnell, 566 F.2d 731, 735 (D.C. Cir. 1977) and observing that "a union member who 'knowingly fail[s] to exercise rights guaranteed or offered' in connection with union disciplinary proceedings will be held to have waived those rights.").

For the foregoing reasons, this Court accepts in part

and rejects in part the Magistrate Judge's August 20, 2002 Report and Recommendation. Plaintiff's motion for judgment on the pleadings is denied. Defendants' motion for summary judgment is granted in part and denied in part. All that remains is Plaintiff's claim that Defendants deprived him of his free speech rights under 29 U.S.C. § 411(a)(2)

s/
Nancy G. Edmunds
U.S. District Judge

Dated: September 17, 2002

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No.01-CV_72578 DT
Hon. Nancy G. Edmunds
Mag. Judge Wallace Capel, Jr.

GREGORY WITTMAN,
Plaintiff,
v.

ROBERT WILSON, PETER ACCICA,
CLAY HAWTHORNE, MICHAEL PASSERI,
of/and LOCAL 32, MICHIGAN,
jointly and severely,
Defendants.

Magistrate Judge Wallace Capel, Jr. August, 20, 2002

REPORT AND RECOMMENDATION

I. INTRODUCTION

In his Complaint, Plaintiff Gregory Wittman raises several claims, pursuant to the Labor-Management Reporting and Disclosure Act ("LMRDA"), Section 101(a)(5). Plaintiff moves to the court for judgment on the pleadings pursuant to Federal Rule of Civil Procedure ("Fed.R.Civ.P.")12(c). The Defendants deny these claims and assert that they are entitled to summary judgment on them, and move the court for summary judgment.

II PLAINTIFF'S STATEMENT OF FACTS

Plaintiff was a member in good standing of Local 32, Michigan, from 1995 until expelled from membership on February 20, 2001[1] Defendant local 32, Michigan, is an affiliate of the International Union of Bricklayers and Allied Craftworkers, AFL-CIO ("IUBAC"), with its principle place of business in the City of Warred, Macomb County, Michigan.

Defendant Robert Wilson currently is, and was the business manager/financial secretary for Local 32, Michigan, and Chief Executive Officer for the purposes of Code 6 in the IUBAC Constitution on December 6, 2000.

Defendant Peter Accica currently is, and was the President of Local 32, Michigan, on December 6, 2000.

Defendant Clay Hawthorne currently is, and was the Vise President of Local 32, Michigan, on December 6, 2000.

Defendant Michael Passeri currently is, and was the Sergeant at Arms of Local 32, Michigan, on December 6, 2000.

On December 6, 2000, at a Local 32, Michigan, membership meeting at 21031 Ryan Road, Warren, Michigan, and during a raffle after the official union business concluded, Plaintiff Gregory Wittman exercised his right to freedom of speech and assembly under the LMRDA by distributing campaign literature to Local 32 members informing said members that he was campaigning for business manager/financial for Local 32, Michigan, that he was campaigning for business manager/financial secretary for Local 32, Michigan, for the June2001 Local 32, Michigan, election.

At said Union meetings during said raffle, Defendant Robert Wilson ordered Gregory Wittman to stop distributing the campaign literature during the raffle by stating similar

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[1] Facts taken verbatim from Plaintiff's Complaint.

words to the effect that Gregory Wittman was interrupting the raffle, that the said campaign literature must be distributed outside.

Gregory Wittman offered to stack said literature in a table for the members to help themselves and
Robert Wilson stated that in the said campaign literature was placed on the table that he would personally throw said literature in the garbage.

Gregory Wittman distributed the said campaign literature inside the meeting hall after the said raffle concluded.

On January 10, 2001 Peter Accica, Clay Hawthorne, and Michael Passeri filed charges against Gregory Wittman.

On Jamuary 17, 2001, Defendant Robert Wilson mailed a certified letter to Plaintiff Gregory Wittman stating that charges were filed against Gregory Wittman.

Robert Wilson selected three members for Local 32, Michigan, to act as a trial committee for said trial. He ordered the said trial committee to schedule a trial against Gregory Wittman.

Robert Wilson informed Gregory Wittman in a letter dated February 1, 2001, that a trial was scheduled for February 20, 2001.

On February 20, 2001, the trial committee found Gregory Wittman guilty of every offense and expelled him from membership of said local.

III. STANDARD OF REVIEW

A judgment on the pleadings under Fed.R.Civ.P. 12(c) is treated under the same standards applied to a dismissal for failure to state a claim under Fed.R.Civ.P. 12(b)(6). *See* Morgan v. Church's Fried Chicken, 829 F.2d 10, 11 (6th Cir. 1987). Where a Rule 12(b)(6) defense is raised by a Rule 12(c) motion for judgment on the pleadings, a rule 12(b)(6) standard is applied. *See* Republic Steel Corp. v. Pennsylvania Engineering Corp., 785 F.2d 174, 182 (7th Cir. 1986).

Under Fed.R.Civ.P. 56(c), summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact the moving party is entitled to judgment as a matte of law." In essence, Rule 56(c) mandates the entry of summary judgment against a party's case, and on which that party will bear the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The Court must view the evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. Bender v. Southland Corp., 749 F.2d 1205, 1210-1211 (6th Cir. 1984). However, the Court is not permitted to judge the evidence or make findings of fact. Ivy Street Corporation v. Alexander, 822 F.2d 1432, 1435 (6th Cir. 1987).

The movant bears the burden of demonstrating the absence of all issues of evidence to support the nonmoving party's case. Celotex Corp., 477 U.S. at 325. Once the moving party discharges this burden, it then shifts to the nonmoving party to present specific facts showing a genuine triable issue. Fed.R.Civ.P. 56(e). To create a genuine issue as to require submission of the issue to a jury. Lucas v. Leaseway Multi Transp. Serv. Inc., 738 F. Supp.214, 217 (E.D. Mich, 1990).

IV. ANALYSIS

Plaintiff alleges that the defendants violated his rights under LMRDA, by failing to comply with statutory requirements before imposing disciplinary action. Specifically, Plaintiff alleges that Defendants failed to provide him with adequate notice of the charges against him. Section 101(a)(5) of the Act provides:

Safeguards against improper disciplinary action....no member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of

dues by such organization or by any other thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.....
29 U.S.C. § 411(a)(5)

The letter which was sent to the Plaintiff contained a list of offences from the Code of Offenses which he was alleged to have violated The letter did not advise him with any information as to times or dates on which he had violated the codes. The letter provided no general or specific instances of conduct by Plaintiff which explained how the codes were violated. Defendants maintain that adequate notice was provided to Plaintiff, by listing the code provision he was alleged to have violated

The requirement of "written specific charges" means "specific enough to inform the accused member of the offense that he has allegedly committed." Int'l Brotherhood of Boilermakers v Hardeman, 401 U.S. 233, 245,91 S. Ct. 609, 616 (1971). "The notice must be so drafted as to inform a member with reasonable particularity of the details of the charges" Berg v. Watson, 417 F. Supp. 806 (S.D. N.Y.1976), quoting, Jacques v. Local 1418. Int'l Longshoremen's Ass'n., 246 F. Supp. 857 (E.D. LA 1965). Most courts view Hardeman as requiring that union disciplinary charges include a statement of facts descripting the incident on which the charge is based. *See* Johnson v. National Association of letter Carriers Branch 1100, 182 F. 3d 1071 (9th Cir. 1999); Frye v. United Steelworkers of America, 767 F 2d at 1222 (7th Cir. 1985). the notice sent to Mr. Wittman does not appear to meet those standards.

Defendants argue, however, that even if notice was inadequate, Plaintiff waived his rights because he failed to appear at the trial despite notice of the date and time of hearing.

A Union member who knowingly fails to exercise rights guaranteed of offered them in connection with union

disciplinary proceedings has waived those rights. *See* Daniels v. National Alliance of Postal and Federal Employees, 1985 WL 6408 (D.D.C.); Ritz v. O'Donnell, 566 F. 2d 731, 185 U.S. App. D.C. 66 (1977).

In this case, Plaintiff did receive notice of the time and date of the hearing. Plaintiff claims that he appeared for that hearing fifteen minutes late, and when he arrived, the door was licked. Since no one answered his knocks, he left. Defendants claim that they waited fifteen minutes after the stated trial time to give the Plaintiff an opportunity to arrive, and upon his failure to do so, proceeded with the trial. Plaintiff did not provide any explanation for his failure to appear to the trial committee or request a rehearing.

The Parties have differing versions as to whether Plaintiff knowingly failed to appear at the hearing, and thereby waived his right to adequate notice.

If a material issue of fact remains in dispute, the court must deny the 12(c) motion. United states v. Any & All Radio Station Transmission Equip., 207 F. 3d 458, 462 (8th Cir. 2000)(cert. denied), 53 U.S. 1071, 121 S. Ct. 761 (2001). According to the Supreme Court, "all that is required is that sufficient evidence supporting claimed factual dispute be shown to require a judge or jury to resolve the parties differing versions of the truth at trial." Anderson v. Liberty Lobby, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Therefore, neither party is entitled to their requested relief on this claim.

The Defendants raise an additional issue in regard to the claim. They argue that Defendants Accica, Hawthorne, and Passeri are entitled to summary judgment because they were not involved in the trial process. This argument fails, however, because these Defendants prepared the charges, and Defendant Wilson served the charges. These Defendants, therefore, were responsible for the adequacy or inadequacy of the charges. Furthermore, one of the offenses for which Plaintiff was charged concerned his conduct at a union meeting. That charge was eventually overturned on appeal.

A union's action in charging and prosecuting a member in a union disciplinary meeting for conduct that is protected by the members free speech rights under the LMRDA, even if these charges are ultimately dismissed, may be a violation of LMRDA. *See* Decarle v. Salamone,977 F. Supp. 617 (W.D. N.Y. 1997)

Plaintiff also argues that actions taken by union officials in prohibiting and preventing him from distributing campaign literature in the union hall during the union meeting and raffle, deprived him of his free speech rights under § 411(a)(2). Section 411(a)(2) provides:

"Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express ant views, arguments, or opinions; and to express at meetings of the labor organization is views, upon candidates in an election of labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct to meetings; provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligation."

Defendants argue that Plaintiff's free speed rights were not violated because the requirement that the dissemination of campaign literature take place outside the union hall is a "reasonable rule" under Sec. 101(a), 29 U.S.C. 411.

They also argue that the restrictions on campaign literature is an alleged violation in which the statute of limitations has already run. Defendants claim that a union member has the right under federal law to file a complaint with the Department of Labor regarding the conduct of a union officer election within one calendar month after meeting certain conditions. 29 U.S.C. 482. Before filing an election

complaint with the Department of Labor, a member must either exhausted internal union remedies with the union or perused [sic] them for three months without obtaining a final decision from the union. 29 U.S.C. § 411 Defendants' arguments do not provide a basis for entry of summary judgment.

It remains a question of material fact as to whether the union acted reasonably in adopting and enforcing the rule prohibiting union members from disseminating campaign literature within the union hall. Defendants claim that the rule is reasonable but have provided insufficient legal support to foreclose the issue.

Secondly, 29 U.S.C. § 411, is a mechanism in which complaints can be filed concerning the conduct of a union election. Nothing within that statute prevents a union member from enforcing his individual rights of free speech protected by 29 U.S.C. § 411. Accordingly, neither party is entitled to the relief requested.

V. CONCLUSION

For the reasons stated above, I respectfully recommend that Plaintiff's Motion for Judgment on the pleadings and Defendants' Motion for Summary Judgment be **DENIED.**

Pursuant to Fed.R.Civ.P. 72(b) and 28 U.S.C. § 636(b)(1), the parties are hereby notified that within ten days after being served with a copy of this recommendation they may serve and file specific, written objections to the proposed findings and recommendations. Further, either party may respond to another party's objections within ten days after being served with a copy thereof. The parties are further informed that failure to timely file objections may constitute a waiver of any further right of appeal to the United States Court of Appeals. United States v. Walters, 638 F. 2d 947 (6th Cir. 1981).

In accordance with the provisions of Fed.R.Civ.P.

6(b), the court in its discretion, may enlarge the period of time in which to file objections to this report.

s/
Wallace Capel, Jr.

Dated: August 20, 2002

APPENDIX E

No. 03-1719
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY WITTMAN,
Plaintiff-Appellant,

v.

ROBERT WILSON, ET.AL.,
Defendants-Appellees.

ORDER

BEFORE: MARTIN, RYAN, and MOORE, Circuit Judges.
April 19, 2004

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY THE ORDER OF THE COURT

s/
Leonard Green, Clerk